

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

KELLY L. FALCON,

Defendant.

NO. CR-04-191-LRS

**ORDER DENYING MOTION TO
RECONSIDER ORDER DENYING
DEFENDANT'S MOTION TO SUPPRESS**

BEFORE THE COURT is the Defendant's Motion to Reconsider Order Denying Defendant's Motion to Suppress (Ct. Rec. 130). On August 17, 2005, the Court heard argument and testimony presented by defense counsel, Kimberly Deater and Tina Hunt, and counsel for the government, Aine Ahmed. The Court denied the Defendant's motion and stated its reasons for the denial orally on the record. This Order is intended to memorialize and supplement the oral ruling of the Court.

On March 25, 2005 the Court entered an Order denying Defendant's Motion to Suppress having concluded that the warrant issued herein was lawful and supported by probable cause, that the search and seizure of the computer was authorized by the warrant, and that the warrant was sufficiently particular. Defendant does not seek reconsideration of these rulings. The Court also held that at that time it could not rule on the specific question of whether the search exceeded the scope of the

1 warrant because there was no proffer of evidence regarding the nature of
2 the evidence actually seized, the manner of the warrant's execution, or
3 whether such evidence was going to be used at trial. The Court
4 commented, however, that a keyword search using the word "arson" was
5 within the scope of the warrant.

6 Defendant's present motion seeks the Court's reconsideration of the
7 issue of whether certain keyword searches conducted during the search of
8 the Defendant's computer exceeded the scope of the warrant. Defendant
9 specifically seeks the suppression of all evidence seized as a result of
10 the keyword searches using search terms such as "arson" and
11 "accelerants." Defendant argues the language of the warrant only
12 authorized the search for financial records relating to the Wildhorse
13 Nite Club, not a generalized search for evidence relating to the crime
14 of arson. Defendant finally argues the plain view exception to the
15 warrant requirement does not apply because the evidence was obtained as
16 a result of an improper search, and not as a result of seeing what was
17 legitimately in "plain view."

18 The Fourth Amendment warrant requirement was intended to prohibit
19 the issuance of a warrant that permits a "general, exploratory rummaging
20 in a person's belongings," *Coolidge v. New Hampshire*, 403 U.S. 443, 467,
21 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), and thereby ensures that the
22 scope of a search will be confined to evidence relating to a specific
23 crime that is supported by probable cause. See *United States v. Leary*,
24 846 F.2d 592, 600 (10th Cir.1988). The Fourth Amendment requires that
25 a search conducted pursuant to a warrant not exceed the strict bounds of
26 the warrant. *Bivens v. Six Unknown Agents*, 403 U.S. 388, 394 n. 7, 91

1 S.Ct. 1999, 29 L.Ed.2d 619 (1971). "If the scope of the search exceeds
2 that permitted by the terms of a validly issued warrant or the character
3 of the relevant exception from the warrant requirement, the subsequent
4 seizure is unconstitutional without more." *Horton v. California*, 496 U.S.
5 128, 140, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Whether a search
6 exceeds the scope of a search warrant must be determined through an
7 objective assessment of the circumstances surrounding the issuance of the
8 warrant, the contents of the search warrant, and the circumstances of the
9 search. *United States v. Hitchcock*, 286 F.3d 1064, 1071 (9th Cir. 2002).
10 In deciding whether a search exceeded its lawful scope, a court may
11 consider both the purpose disclosed in the warrant application and the
12 manner of the warrant's execution. *Hitchcock supra*, (quoting *United*
13 *States v. Rettig*, 589 F.2d 418, 423 (9th Cir.1978)).

14 Despite the need for close construction of the language of a warrant
15 authorizing a search, "affidavits for search warrants ... must be tested
16 and interpreted by magistrates and courts in a commonsense and realistic
17 fashion. They are normally drafted by nonlawyers in the midst and haste
18 of a criminal investigation. Technical requirements of elaborate
19 specificity once exacted under common law pleadings have no proper place
20 in this area. A grudging or negative attitude by reviewing courts toward
21 warrants will tend to discourage police officers from submitting their
22 evidence to a judicial officer before acting." *U.S. v. Ventresca*, 380
23 U.S. 102, 109 85 S.Ct. 741 (1965); See also *United States v. Cannon*,
24 264 F.3d 875, 878-79 (9th Cir. 2001) (same). Similarly, a warrant must
25 be interpreted in a "common sense and realistic fashion." *United States*
26 *v. Federbush*, 625 F.2d 246, 251 (9th Cir. 1980) (rejecting the

1 defendants' "hypertechnical" argument that "warrants limit[ing] the items
2 to be seized to those held 'in violation of' [a particular statute]
3 precluded the seizure of 'mere evidence' of the commission of the
4 crime"); *See also United States v. Martin*, 157 F.3d 46, 52 (2d Cir. 1998)
5 (noting that warrants should be read in a common sense as opposed to a
6 hypertechnical and cramped manner).

7 The Court finds the keyword search of the computer utilizing the
8 terms "arson" and "accelerants" did not exceed the scope of the warrant.
9 At the time of the application for the warrant law enforcement had
10 determined that the fire on April 7, 2004 at the Wildhorse Nite Club,
11 owned by the Defendant, had been deliberately set. Based upon Agent
12 Hart's training and experience, Agent Hart stated in his affidavit
13 offered in support of the search warrant application that 1) arsonists
14 who set or plan fires involving their business, do so for financial gain;
15 2) arsonists who set or plan fires involving their business for financial
16 gain are frequently in an adverse financial position, making financial
17 information relevant; and 3) arsonists who set or plan fires involving
18 their business "commonly attempt to conceal...items for a period of time
19 generally at or near their domicile, on their person, or in their
20 vehicle." Attachment "B", Defendant's Memorandum in Support of Defense
21 Motion to Suppress, Affidavit at 13-14. It was Agents Hart's belief
22 that "documents, records, and *other evidence*" of violations of 18 U.S.C.
23 §§ 844(i), 844(h), and 1341, would be located at the residence and in the
24 vehicle described therein, in addition to "property which was used as a
25 means of committing such offenses..." *Id.* at ¶ 25 (emphasis added).
26 Agent Hart then set forth a list of such property citing "computer or

1 electronic storage records pertaining to the Wild Horse Nite Club from
2 July 2003 to the present date." *Id.*

3 The warrant permits the search of the Defendant's residence for:

4 Financial records, receipts, insurance documents, telephone bills,
5 checking account records, canceled checks, bank statements, deposit
6 tickets, business records, ledgers, scheduled payment plans,
7 purchase agreements, written notes, journals, business photographs,
8 expense records, demand letters and correspondence from banks,
9 lending institutions, insurance companies and *any computer or
electronic storage records pertaining to the Wild Horse Nite Club
from July 2003 to the present date...*

...
concerning a violation of Title 18 United States Code, Section(s)
844(i), 844(h), and 1341...

10 Attachment "B", Defendant's Memorandum in Support of Defense Motion to
11 Suppress, Warrant.

12 An objective assessment of the language of the warrant includes
13 permission to search the computer for evidence relating to the specific
14 crimes under investigation as set forth in the warrant, including arson.
15 Additionally, the warrant limited the seizure of evidence to evidence
16 related to the Wildhorse Nite Club, which was the subject of the arson
17 under investigation, from the date of July 2003 on. The warrant does not
18 include a limitation of the search to any particular type of files or the
19 seizure to any particular type of evidence. To suggest that the search
20 of the computer was limited to that one particular type of relevant
21 evidence of arson is unjustified and would be an unreasonable hyper-
22 technical construction of the warrant. Notably, the warrant was drafted
23 without any knowledge of the computer's contents and did not limit the
24 search to any specific areas of the hard drive. *See United States v. Hay*
25 *231 F.3d 630, 637 (9th Cir.2000)* (the specific location the items are
26 expected to be found on the computers is not required in the warrant).

1 Accordingly the keyword searches conducted in this case which involved
2 the mechanical screening of all areas of the computer's hard drive did
3 not exceed the scope of the warrant.

4 As defense counsel noted during oral argument, the warrant did not
5 prescribe any specific search methodology. However, as explained in the
6 Court's earlier ruling, warrants rarely do because "the warrant process
7 is primarily concerned with identifying what may be searched or
8 seized-not how..." *United States v. Upham*, 168 F.3d 532, 537 (1st Cir.
9 1999). The keyword search conducted here was not a general "rummaging"
10 in the Defendant's property, violative of the Fourth Amendment. The
11 keyword search was limited to search terms relevant to the specific
12 crimes under investigation. This fact distinguishes this case from the
13 case cited by the Defendant during oral argument, *United States v. Carey*,
14 172 F.3d 1268 (10th Cir. 1999), wherein the search of image files
15 containing pornographic material was deemed not within the scope of
16 warrant authorizing search for evidence of drug trafficking.

17 Accordingly, the Court declares the keyword searches conducted on
18 the Defendant's computer using terms related to the crime of arson did
19 not exceed the scope of the warrant and Defendant's Motion for
20 Reconsideration (Ct. Rec. 130) is **DENIED**.

21 **IT IS SO ORDERED.** The District Court Executive is directed to enter
22 this order and to provide copies to counsel.

23 **DATED** this 22nd day of August, 2005.

24 S/Lonny R. Suko
25 LONNY R. SUKO
26 United States District Judge